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IN THE COURT OF APPEALS OF INDIANA

J.B., A MINOR CHILD,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 42A01-0708-CV-366
	)	
THE BOARD OF TRUSTEES OF VINCENNES UNIVERSITY,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry Biddinger-Gregg, Judge
Cause No. 42C01-0512-PL-745

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

J.B. appeals from the trial court's entry of summary judgment in favor of The Board of Trustees of Vincennes University ("the Board"). J.B. presents a single issue for our review, namely, whether there exists a genuine issue of material fact precluding summary judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

During the Summer of 2001, J.B., a minor at the time, met Lloyd Coats, an adult, while the two were at a pond in Knox County. After a few meetings at the pond, one day, Coats offered J.B. money to engage in a sex act, and J.B. complied. Coats continued to molest J.B. over the course of about one year. The molestations occurred at Coats' residence, a local newspaper office, and in Coats' private vehicles.

At that time, Coats was employed part-time as a bus driver for Vincennes University ("the University"). Coats drove students and faculty of the University to and from special events on weekends. Coats' employment did not involve transporting members of the general public, and he did not otherwise provide general transportation at the University. Coats had previously been convicted of misdemeanor battery and misdemeanor recklessly furnishing alcoholic beverage to a minor, but he did not report those convictions on his University employment application. Further, the University did not conduct a criminal history check before hiring Coats.

One day during 2002, Coats asked J.B. to accompany him to a retail store located in Vincennes. In the course of that trip, Coats took J.B. to a garage on the University's

campus where buses were parked. Coats proceeded to molest J.B. inside a bus parked in that garage. Coats was not working in his capacity as a bus driver for the University the day of that incident.

J.B. eventually reported the molestations, and police arrested Coats. On October 27, 2005, J.B. filed a complaint against the Board alleging that the Board's negligence proximately caused his injuries. J.B. asserted two theories of negligence: negligent hiring/retention and respondeat superior. The Board filed a motion for summary judgment, and the trial court granted that motion following a hearing. The trial court found and concluded in relevant part:

> [In light of the holding in Baugher v. A. Hattersley & Sons, Inc., 436 N.E.2d 126 (Ind. Ct. App. 1982),] [t]he Court cannot find a basis for holding that V.U. owed a duty to the plaintiff under [the theory of negligent hiring/retention] when the plaintiff had no connection to V.U. whatsoever. He did not meet Coats or have contact with Coats as a result of Coats' employment at V.U. In fact, the sexual activity/molestation had occurred on an ongoing basis for quite some time before the alleged sexual activity/molestation occurred on V.U. property and J.B. did not meet Coats as a direct result of his employment relationship with V.U.
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> *** * ***
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> Undisputed facts establish that Coats and J.B. first met in the summer of 2001 and that incidents of sexual activity/molestation began during that time. The facts also establish that the incident of sexual activity/molestation which is the basis of the plaintiff's complaint occurred the one time that Coats and J.B. were together on the V.U. campus. The purpose of the trip to Vincennes that day was to pick up photographs from Wal-Mart or K-Mart which had been developed for Coats' newspaper business. Coats was driving his personal pick-up truck, and was not performing any duty as a bus driver for V.U. Coats simply had access to the garage and bus on V.U. property and took J.B. there and molested him. This act was solely for Coats' personal gratification and for his own purposes and V.U. should not be held responsible therefor. Sufficient issues of material fact do not exist so as to preclude the grant of summary judgment on [the theory of respondeat superior].

* * *

> The plaintiff also brings his cause of action against V.U. based on a non-delegable duty—also commonly known as "common carrier liability" and relies upon the decision of the Indiana Supreme Court in Stropes v. Heritage House Children's Center of Shelbyville, Inc., 547 N.E.2d 244 (Ind. 1989).
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> The Supreme Court in Stropes held that an employer may assume a nondelegable duty to provide protection and care to another so as to fall within the common carrier exception so as to impose strict liability. However, this nondelegable duty is only imposed when there is a total lack of autonomy of a plaintiff and complete control exercised by the defendant over a plaintiff. . . .
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> * * *
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> No question exists here that J.B. was not a student at V.U. What the Court's decision does depend on is that at no time did J.B. surrender any autonomy to V.U., nor did V.U. exercise any control whatsoever over J.B. This theory of liability is simply inapplicable to the present case.

Appellant's App. at 5-8. This appeal ensued.

DISCUSSION AND DECISION

In reviewing summary judgment, we apply the same standard as the trial court. Wright v. Am. States Ins. Co., 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Any doubt as to a fact, or an inference to be drawn, is resolved in favor of the non-moving party. Sanchez v. Hamara, 534 N.E.2d 756, 757 (Ind. Ct. App. 1989). The appellant bears the burden of persuading us the grant of summary judgment was erroneous. Bank One Trust No. 386 v. Zem, Inc., 809 N.E.2d 873, 878 (Ind. Ct. App. 2004), trans. denied.

We note that the trial court made findings and conclusions in support of its entry of summary judgment. Although we are not bound by the trial court's findings and conclusions, they aid our review by providing reasons for the trial court's decision. See Ledbetter v. Ball Mem'l Hosp., 724 N.E.2d 1113, 1116 (Ind. Ct. App. 2000), trans. denied. If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Id.

On appeal, J.B. does not challenge the trial court's determination that the material facts are essentially undisputed in this case. Instead, J.B. contends that the trial court misapplied the law to those facts. First, J.B. maintains that the trial court erred when it found that the Board is not liable under the theory of negligent hiring/retention. And second, J.B. maintains that the trial court erred when it found that the Board is not liable under respondeat superior. We address each contention in turn.[1]

Negligent Hiring/Retention

This court has previously addressed a negligent hiring/retention claim in a context analogous to that presented here. In Baugher v. A. Hattersley & Sons, Inc., 436 N.E.2d 126 (Ind. Ct. App. 1982), the defendant, an electrical contracting firm, knowingly hired Ronald Osborne, who was on parole for armed robbery. Early one morning in 1979, Osborne met a cocktail waitress at a nearby establishment, and he invited her and a friend of hers out to breakfast. Osborne then drove the women in a company-owned vehicle to his place of employment, and, once inside, he raped both women. The women

[1] J.B. does not present cogent argument on the issue of whether the Board had a nondelegable duty to protect J.B. under the rule set out in Stropes v. Heritage House Children's Ctr. Of Shelbyville, Inc., 547 N.E.2d 244 (Ind. 1989). As such, the issue is waived. Waiver notwithstanding, the undisputed facts support the determination that the Board did not have a nondelegable duty to protect J.B.

subsequently sued A. Hattersley & Sons, Inc., alleging negligent hiring and negligence in "making the various instrumentalities involved in the perpetration of [Osborne's] acts available to him." Id. at 128.

The trial court entered summary judgment in favor of the employer, and the victims appealed. This court held as follows:

> In Tindall et al. v. Enderle et al., (1974), 162 Ind. App. 524, at 528, 320 N.E.2d 764, at 767, it was established that "Indiana law recognizes at least a separate cause of action based upon the negligent hiring of an employee." See also Restatement (Second) of Agency § 213 (1957). However, this Court noted further that "[t]he general duty here at issue arises from the duty imposed upon an employer who invites the public to his business to use care in the choice of employees expected to deal with customers." Id. at 527, note 2, 320 N.E.2d at 766, note 2.
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> This limitation on the employer's duty was also recognized in Lange v. B & P Motor Express, Inc., [257 F.Supp. 319, 322 (N.D. Ind. 1966).]. . . [In that case, the Court held that] "the mere existence of the employer-employee relationship does not entitle a third person to seek recovery for injuries inflicted by the employee on the theory of negligence in hiring." Id. at 323.
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> In the instant cause, appellants were neither customers, patrons, nor invitees of A. Hattersley & Sons, Inc. As such, they were beyond the scope of the duty owed by the company to the public. Appellants present no persuasive policy consideration which would justify the expansion of that duty.

Baugher, 436 N.E.2d at 128 (footnote omitted, emphasis added).

Here, again, the undisputed evidence shows that J.B. was not a student at the University. J.B. contends, however, that because the University is a public university, it owes him and all members of the public a duty to refrain from hiring someone with Coats' criminal background. But J.B. does not direct us to any legal authority to support that contention, and we are not aware of any such authority. Further, to the extent J.B. asserts that public policy considerations dictate a finding of duty in this case, J.B. has

not supported that contention with citations to relevant authority. As such, the issue is waived. See Indiana Appellate Rule 46(A)(8).

We agree with the trial court that our holding in Baugher is dispositive of the issue here. Because J.B. was merely a member of the public in relation to the University, and because the University did not hire Coats in any capacity to deal with members of the public, J.B. cannot show a duty under the theory of negligent hiring/retention. The trial court did not err when it entered summary judgment in favor of the Board on this issue.

Respondeat Superior

Respondeat superior imposes liability, where none would otherwise exist, on an employer for the wrongful acts of his employee which are committed within the scope of employment. Stropes by Taylor v. Heritage House Children's Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 247 (Ind. 1989). In Konkle v. Henson, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996), this court explained:

> The determination of whether an employee was acting within the scope of his employment does not turn on the type of act committed. An employer can be vicariously liable for the criminal acts of an employee. The test is whether the employee's actions were at least for a time authorized. If there is a sufficient association between the authorized and unauthorized acts, then the unauthorized acts can be within the scope of employment. If some of the employee's actions were authorized, the question of whether the unauthorized acts were within the scope of employment is one for the jury. However, if none of the employee's acts were authorized, there is no respondeat superior liability and summary judgment is proper.

(Emphases added).

Here, the undisputed evidence is that Coats was "only authorized to be [in the garage] if he ha[d] an assigned trip or if he's there to check the bus for maintenance

issues. He's not authorized to have anybody with him, the general public or private persons." Appellant's App. at 75. J.B. does not make any contention that Coats was performing any of those authorized duties on the date of the incident.[2] Thus, there is no genuine issue of material fact regarding whether Coats' actions were "at least for a time authorized." See Konkle, 672 N.E.2d at 457. The trial court did not err when it granted summary judgment on this issue.

Affirmed.

BAILEY, J., and CRONE, J., concur.

[2] J.B. contends that the testimony regarding Coats' authorized and unauthorized conduct was "false or grossly mistaken" since, contrary to the witness's statement, there is no written job description. Brief of Appellant at 16. But that argument is without merit. Whether with or without corroboration, the uncontradicted designated evidence shows that Coats' conduct was not authorized by the University at any time during the day of the incident, which is sufficient to support summary judgment.